

A **SHUDANGSHU CHANDRA v. KETUA PENGARAH
IMIGRESEN MALAYSIA & ORS**

FEDERAL COURT, PUTRAJAYA
NALLINI PATHMANATHAN FCJ
HARMINDAR SINGH DHALIWAL FCJ
B RHODZARIAH BUJANG FCJ
[CRIMINAL APPEAL NO: 05(HC)-39-03-2021 (D)]
26 JANUARY 2022

C **Abstract** – *The order of detention under s. 35 Immigration Act 1959/63 ('Act') and subsequent order of further detention under s. 34 of the Act against an immigrant to facilitate his deportation to his country of origin was not made mala fide and did not contravene art. 5 of the Federal Constitution, more so, where all the requirements for the detention had been complied with. And, while the citation of the wrong provision for the deportation order per se was not an evidence of mala fide, the error rendered the deportation order illegal.*

E **CRIMINAL PROCEDURE:** *Habeas corpus – Detention – Immigrant arrested and compounded for offence under reg. 39(b) of Immigration Regulations 1963 ('Regulations') – Subsequent order for further detention and deportation from Malaysia – Citation of wrong provision for deportation – Whether evidence of mala fide – Whether rendered deportation order illegal – Whether deportation order ought to be set aside – Immigration Act 1959/63, s. 56(1) & (2)*

F **IMMIGRATION:** *Detention – Detention order – Immigrant arrested and compounded for offence under reg. 39(b) of Immigration Regulations 1963 ('Regulations') – Subsequent order for further detention and deportation from Malaysia – Challenge against order of detention – Whether order made mala fide – Whether further detention ordered pending decision of removal from country – Whether order contravened provisions of law – Whether detention legal*

G **STATUTORY INTERPRETATION:** *Construction of statute – Interpretation – Section 34 of Immigration Act 1959/63 ('Act') – Legality of detention – Whether Director General empowered to detain any person ordered to be removed whilst arrangements being made for his removal – Whether applicable only to offenders convicted under ss. 5, 6, 8, 9, and 60 of Act*

H The appellant was a Bangladeshi employee of RCM Cemerlang (M) Sdn Bhd ('employer') holding a temporary employment pass by the Immigration Department which was valid until 12 March 2021. The immigration authority arrested the appellant on 5 September 2020 after being allegedly found working at a coffee shop whilst on leave, an offence under reg. 39(b) of the Immigration Regulations 1963 ('Regulations'). The Magistrate ordered a detention of 14 days under s. 51(5)(b) of the Immigration Act 1959/63

I

(‘Act’) from 5 September 2020 until 18 September 2020. On 15 September 2020, a compound for the offence was offered to the appellant which was accepted and paid by his employer. On that same day, he was detained under s. 35 of the Act and an administrative order was made by the Immigration Department’s Head of Enforcement for action to be taken to deport the appellant. The employer’s appeal against that decision was rejected by the Immigration Department’s ‘Jawatankuasa Rayuan Imigresen Negeri’ (‘Committee’) on 22 September 2020 and his removal from Malaysia was ordered. On 1 October 2020, he was remanded for 14 days by the Sessions Court, and, upon its expiry on 14 October 2020, the appellant was further detained under s. 34 of the Act to facilitate his deportation from Malaysia as per the order of removal made on the same date. However, prior to that, on 5 October 2020, the appellant had filed an application for a writ of *habeas corpus* challenging his detention order dated 15 September 2020 on the grounds that: (i) it was void as he had paid the said compound and was not a prohibited person who should be so removed; and (ii) the deportation order was made without giving him the opportunity to appeal to the Ministry of Home Affairs (‘third respondent’). Hence, at the High Court, additional grounds for the issuance of the writ were canvassed, *ie*, the validity of the notice of cancellation of the pass, the deportation order and detention order. The High Court Judge (‘HCJ’) granted an interim stay of the deportation order until the disposal of the *habeas corpus* application and the stay order was extended until the disposal of the present appeal. The said extension was ordered after the HCJ delivered his decision to dismiss the appellant’s application for the writ of *habeas corpus*. The grounds raised for the appeal herein were: (i) the appellant’s further detention on 15 September 2020 under s. 35 of the Act was void, invalid and made *mala fide*; (ii) the notice of revocation of the pass dated 14 October 2020 was improper and also made *mala fide*; (iii) the detention under s. 34 was invalid and made *mala fide*; and (iv) the deportation order was against the law and made *mala fide*.

Held (allowing appeal)

Per Rhodzariah Bujang FCJ delivering the judgment of the court:

- (1) Since the appellant had committed an offence under reg. 39(b), he falls under the phrase ‘a person reasonably believed to be a person liable to removal from Malaysia’ as highlighted in reproduction of s. 35 and hence, his further detention pending a decision on his removal from the country. Section 35 is not contrary to art. 5 of the Federal Constitution (‘FC’) because (i) the clear proviso in art. 5(4) on the requirement to produce the arrested before a Magistrate within 14 days of his arrest applies to the initial arrest and detention and this requirement is clearly incorporated in s. 51(5)(b); and (ii) his further detention under s. 35 was merely pending a decision whether to remove him. It was obvious from Part V of the Act in which the said section is legislated that a ‘person liable to removal from Malaysia’ is one who has committed a

- A transgression under the Act which warrants the exercise of the Immigration authority's power under s. 51(5). Once that said decision to remove is made, then s. 34 comes into play. It is therefore a continuous process and given the incorporation of the proviso into s. 51(4) as stated earlier, there is no legal necessity to repeat the same requirement in s. 35. (paras 6 & 7)
- B
- C (2) The appellant was brought before the Magistrate right after his initial arrest and was brought before the Sessions Court Judge ('SCJ') on 1 October 2020 before the expiry of his 30 days detention under s. 35, which was before the cancellation of his pass on 14 October 2020 as per the notice dated the same date. His re-arrest and detention under s. 34 were done on the same day. From 1 October 2020 until 30 December 2020, the appellant was brought before the SCJ seven times to extend his remand. Therefore, there was no contravention of the law. (para 9)
- D (3) Section 3(3)(a) and (b) of the Act allows the exercise of the Director General's power to be done by a Deputy Director General of Immigration or any other Senior Immigration Officer. The service of the notice was also a non-issue because the notice was served personally on the appellant. Although reg. 19(3) uses the word 'sent to the holder of the pass', clearly, the intention of the legislative is to notify the pass holder of the said cancellation and there could be no better way to do that than to give the notice to him in person. The interim stay was against the deportation of the appellant and given the contravention of the pass by him, as evidenced by the payment of the compound fee, the official move of the Department was more than justified. (paras 10 & 11)
- E
- F (4) There was no issue about the legality of the appellant's detention under the s. 34. It was clear from the headings and the reading of Part V of the Act titled 'Removal from Malaysia' that each provision in Part V, ss. 31 until 36, caters for different situations pertaining to the removal. The Director General is given the power to detain any person ordered to be removed whilst arrangements are being made for his removal. That was obviously the case with the appellant here for the order for his removal had been made. There was no such limitation for that section to only be utilised against offenders convicted of the ss. 5, 6, 8, 9 and 60. The appellant was given, and he did utilise his right to appeal against his removal, but that appeal was rejected by the Committee. Hence, there was no merit in the argument that the commission of an offence under reg. 39(b) would not be a legal basis to order the removal of an immigrant like the appellant. (paras 12-14 & 16)
- G
- H
- I (5) The deportation order was stated to be made under s. 56(2) of the Act but the appellant did not commit such an offence under s. 56(1). The wrong citation of the relevant provision, in itself, could not be evidence of *mala fide* and the issuance of the special pass was further evidence of

the respondent's good faith in respect of his detention. Nevertheless, that error had rendered the deportation order illegal and it must accordingly be set aside for the simple reason that the law is trite and entrenched that a detainee like the appellant was entitled to take full advantage of any technical imperfection which had the effect of invalidating the order that incarcerated him without trial or even with trial. No court of law should condone such an error, which actually was easily rectified by an application to amend the same. On this basis, the appellant was entitled to be granted the writ of *habeas corpus* as prayed and thus the respondent's pre-emptive decision to release him must therefore be maintained. (para 18)

A
B
C

Bahasa Melayu Headnotes

Perayu seorang warga Bangladesh, yang bekerja di RCM Cemerlang (M) Sdn Bhd ('majikan') dan memegang pas lawatan sementara oleh Jabatan Imigresen yang sah sehingga 12 Mac 2021. Pihak berkuasa imigresen menangkap perayu pada 5 September 2020 selepas didapati bekerja di sebuah kedai kopi semasa hari cuti, satu kesalahan bawah per. 39(b) Peraturan-peraturan Imigresen 1963 ('Peraturan-peraturan'). Majistret membuat perintah tahanan 14 hari bawah s. 51(5)(b) Akta Imigresen 1959/63 ('Akta') dari 5 September 2020 hingga 18 September 2020. Pada 15 September 2020, tawaran kompaun diberi kepada perayu yang diterimanya dan dibayar oleh majikannya. Pada hari sama, dia ditahan bawah s. 35 Akta dan satu perintah pentadbiran dibuat oleh Ketua Penguatkuasa Jabatan Imigresen agar tindakan diambil untuk menghantar perayu pulang. Rayuan majikan terhadap keputusan itu ditolak Jawatankuasa Rayuan Imigresen Negeri Jabatan Imigresen ('Jawatankuasa') pada 22 September 2020 dan pengusirannya dari Malaysia diperintahkan. Pada 1 Oktober 2020, dia ditahan untuk 14 hari oleh Mahkamah Sesyen dan apabila tempoh itu luput pada 14 Oktober 2020, perayu ditahan lanjut bawah s. 34 Akta untuk memudahkan pengusirannya dari Malaysia menurut perintah pengusiran yang dibuat pada hari sama. Walau bagaimanapun, sebelum itu, pada 5 Oktober 2020, perayu memfailkan permohonan writ *habeas corpus* mencabar perintah penahanannya bertarikh 15 September 2020 atas alasan-alasan: (i) perintah itu batal kerana dia telah membayar kompaun dan bukan orang yang dilarang yang wajar diusir; dan (ii) perintah pengusiran dibuat tanpa dia diberi peluang merayu ke Kementerian Dalam Negeri ('responden ketiga'). Oleh itu, di Mahkamah Tinggi, alasan-alasan tambahan untuk pengeluaran writ dikemukakan, iaitu, kesahan notis pembatalan pas, perintah pengusiran dan perintah penahanan. Hakim Mahkamah Tinggi ('HMT') membenarkan penangguhan sementara perintah pengusiran tersebut sehingga pelupusan permohonan *habeas corpus* dan perintah penangguhan dilanjutkan sehingga pelupusan rayuan ini. Lanjutan itu diperintahkan selepas HMT menyampaikan keputusannya menolak permohonan perayu untuk writ *habeas corpus*. Alasan-alasan yang dikemukakan untuk rayuan ini adalah: (i) penahanan lanjut perayu pada

D
E
F
G
H
I

- A 15 September 2020 bawah s. 35 Akta adalah batal, tidak sah dan dibuat *mala fide*; (ii) notis pembatalan pas bertarikh 14 Oktober 2020 tidak wajar dan juga dibuat *mala fide*; (iii) penahanan bawah s. 34 tidak sah dan dibuat *mala fide*; dan (iv) perintah pengusiran tersebut bertentangan dengan undang-undang dan dibuat *mala fide*.
- B **Diputuskan (membenarkan rayuan)**
Oleh Rhodzariah Bujang HMP menyampaikan penghakiman mahkamah:
- (1) Oleh sebab perayu telah melakukan kesalahan bawah per. 39(b), dia terangkum bawah frasa ‘orang yang secara munasabah dipercayai orang yang wajar diusir dari Malaysia’ seperti yang ditekankan dalam s. 35 yang diterbitkan semula dan oleh itu, penahanan lanjutnya sementara menunggu keputusan pengusirannya dari negara. Seksyen 35 tidak bertentangan dengan per. 5 Perlembagaan Persekutuan (‘Perlembagaan’) kerana (i) proviso jelas dalam per. 5(4) tentang keperluan mengemukakan orang yang ditahan di hadapan Majistret dalam tempoh 14 hari dari tarikh tangkapan diguna pakai pada tangkapan dan penahanan awal dan keperluan ini jelas dimasukkan dalam s. 51(5)(b); dan (ii) penahanan lanjutnya bawah s. 35 hanya sementara menunggu keputusan pengusirannya. Jelas dari Bahagian V Akta yang didalamnya seksyen tersebut digubal bahawa ‘orang yang wajar diusir dari Malaysia’ adalah orang yang telah melakukan pelanggaran bawah Akta yang mewajarkan pelaksanaan kuasa pihak berkuasa imigresen bawah s. 51(5). Sebaik sahaja keputusan pengusiran dibuat, s. 34 berkuatkuasa. Oleh itu, ini adalah proses berterusan dan memandangkan penggabungan proviso itu dalam s. 51(4) seperti yang dinyatakan sebelumnya, tiada keperluan undang-undang untuk mengulang semula keperluan dalam s. 35.
- (2) Perayu dikemukakan di hadapan Majistret sebaik selepas tangkapannya dan dibawa ke hadapan Hakim Mahkamah Sesyen (‘HMS’) pada 1 Oktober 2020 sebelum tamat penahanan 30 harinya bawah s. 35, yang adalah sebelum pembatalan pasnya pada 14 Oktober 2020 seperti notis bertarikh sama. Penangkapan dan penahanan semula perayu bawah s. 34 dibuat pada hari sama. Dari 1 Oktober 2020 hingga 30 Disember 2020, perayu dibawa ke hadapan HMS sebanyak tujuh kali untuk melanjutkan penahanannya. Oleh itu, tiada percanggahan undang-undang.
- (3) Seksyen 3(3)(a) dan (b) Akta membenarkan pelaksanaan kuasa Ketua Pengarah dibuat oleh Timbalan Ketua Pengarah Imigresen atau mana-mana Pegawai Kanan Imigresen. Penyerahan notis tersebut juga tidak menjadi isu kerana notis itu diserahkan secara ke diri kepada perayu. Walaupun per. 19(3) menggunakan perkataan ‘dihantar kepada pemegang pas’, jelas, niat badan perundangan adalah untuk memberitahu pemegang notis tentang pembatalan tersebut dan tiada cara yang lebih baik untuk berbuat begitu selain daripada memberi notis secara kediri.

Penangguhan sementara tersebut adalah bertentangan dengan pengusiran perayu dan berdasarkan percanggahan pas olehnya, seperti yang dibuktikan dengan pembayaran fi kompaun, tindakan Jabatan itu adalah lebih daripada berjustifikasi.

- (4) Tiada isu tentang kesahan penahanan perayu bawah s. 34. Jelas daripada tajuk dan pembacaan Bahagian V Akta bertajuk 'Pengusiran dari Malaysia', bahawa setiap peruntukan dalam Bahagian V, ss. 31 hingga 36, memperuntukkan untuk situasi berbeza berkaitan pengusiran. Ketua Pengarah diberi kuasa untuk menahan mana-mana orang yang diperintahkan untuk diusir sementara pengurusan untuk pengusirannya dibuat. Itu yang berlaku pada perayu di sini kerana perintah pengusirannya telah dibuat. Seksyen itu tidak terbatas untuk digunakan hanya terhadap pesalah-pesalah yang disabitkan atas ss. 5, 6, 8, 9 dan 60. Perayu telah diberi, dan telah menggunakan haknya untuk merayu terhadap pengusirannya, tetapi rayuan itu ditolak oleh Jawatankuasa. Oleh itu, tiada merit dalam hujahan bahawa kesalahan yang dilakukan bawah per. 39(b) tidak akan menjadi asas undang-undang untuk mengarahkan pengusiran seorang imigran seperti perayu.
- (5) Perintah pengusiran dikatakan dibuat bawah s. 56(2) Akta tetapi perayu tidak melakukan kesalahan bawah s. 56(1). Kesilapan menyatakan peruntukan yang betul semata-mata tidak boleh menjadi keterangan *mala fide* dan pengeluaran pas khas adalah keterangan lanjut tentang kejujuran responden berkaitan penahanan itu. Walau bagaimanapun, kesilapan itu menjadikan pengusirannya tidak sah dan, dengan itu, perlu diketepikan kerana undang-undang adalah matan dan terpahat bahawa seorang tahanan seperti perayu berhak menggunakan sepenuhnya faedah ketidaksempurnaan teknikal yang mempunyai kesan menidaksahkan perintah pengurungannya tanpa bicara atau dengan bicara. Tiada mahkamah undang-undang yang wajar menyokong kesilapan sedemikian yang sebenarnya boleh dibetulkan dengan mudah melalui permohonan untuk pindaan. Atas alasan ini, perayu berhak diberi writ *habeas corpus* seperti yang dipohon dan oleh itu, keputusan responden yang terlebih dahulu membebaskannya wajar dikekalkan.

Case(s) referred to:

Ketua Pengarah Imigresen & Ors v. Mohammad Abu Shaleh (Criminal Appeal No: 05(HC)-234-10-2018(W)) (Unreported) FC (refd)

Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri & Satu lagi [1994] 4 CLJ 47 SC (refd)

Nivesh Nair Mohan v. Dato' Abdul Razak Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors [2021] 8 CLJ 163 FC (refd)

Pua Kim Wee v. Ketua Pengarah Imigresen Malaysia & Anor [2016] 1 LNS 1358 HC (refd)

Re Datuk James Wong Kim Min; Minister Of Home Affairs, Malaysia & Ors v. Datuk

- A** *James Wong Kim Min* [1976] 1 LNS 129 FC (*refd*)
Sajad Hussain Wani v. Ketua Pengarah Imigresen Malaysia & Satu Lagi [2008] 2 CLJ 403 HC (*dist*)
Zaidi Kanapiah v. ASP Khairul Fairoz Rodzuan & Ors And Other Appeals [2021] 5 CLJ 581 FC (*refd*)

- B** **Legislation referred to:**
 Federal Constitution, art. 5(4)
 Immigration Act 1959/63, ss. 3(3)(a), (b), 5, 6, 8(3), 9(1)(a), (4), (7), 15B(1), 32, 34(1), 35, 36, 51(4), (5)(b), 56(2), 59A, 60
 Immigration Regulations 1963, regs. 19(3), 26(1), 39(b)

- C** *For the appellant - M/s T Harpal & Assocs*
For the respondents - DPP
 [Editor's note: Appeal from High Court, Kota Bharu; Criminal Application No: DA-44-32-10-2020 (overruled).]

Reported by S Barathi

D **JUDGMENT**

Rhodzariah Bujang FCJ:

- [1]** The appellant, a Bangladeshi, was an employee of a company, RCM Cemerlang (M), Sdn Bhd ("the employer") who was given a temporary visit employment pass ("the pass") by the Immigration Department which was valid until 12 March 2021. He was arrested by the immigration authority on 5 September 2020 at 6.40pm after being allegedly found working at a coffee shop whilst on leave, which act is an offence under reg. 39(b) of the Immigration Regulations 1963 ("the Regulations"). The appellant was produced before a Magistrate who ordered his detention for 14 days under s. 51(5)(b) of the Immigration Act 1959/63 ("the Act") from 5 September 2020 until 18 September 2020 and this can be seen from the detention notice to that effect which was issued and signed by Amran bin Abd Aziz, Senior Deputy Assistant Director of Immigration, Immigration Department of Malaysia. On 15 September 2020, a compound for the offence was offered to the appellant which was accepted and his employer paid the compound fee of RM300 on his behalf. On that same day, that is 15 September 2020 he was detained under s. 35 of the Act at the Immigration Depot Detention Centre of Tanah Merah, Kelantan for 30 days. An administrative order was made by the Immigration Department's Head of Enforcement for action to be taken to deport the appellant. The employer's appeal against that decision was rejected by the Immigration Department's "Jawatankuasa Rayuan Imigresen Negeri" (hereinafter referred to as the Committee) on 22 September 2020 and his removal from Malaysia or deportation was ordered. On 1 October 2020, he was remanded for 14 days by the Sessions Court and on the expiry of that remand order, that is 14 October 2020 the appellant was further detained under s. 34 of the Act to facilitate his deportation from Malaysia as per the order of removal made on the same

date, 14 October 2020. However, prior to the said date, on 5 October 2020, the appellant had filed an application for a writ of *habeas corpus* challenging his detention order dated 15 September 2020 on the grounds, firstly, that it was void as he had paid the said compound and was not a prohibited person who should be so removed and secondly, that the deportation order was made without giving him the opportunity to appeal to the Ministry of Home Affairs (sued as the third respondent in this appeal). Thus, when the matter came up for hearing before the learned High Court Judge, additional grounds for the issuance of the writ were canvassed, which are the validity of the notice of cancellation of the pass, the deportation order and detention order, all dated 14 October 2020. On 12 October 2020, the learned High Court Judge granted an interim stay of the deportation order until the disposal of the *habeas corpus* application and on 11 April 2021 that stay order was extended until the disposal of his appeal before this court. The said extension was ordered after the learned High Court Judge (“HCJ”) delivered his decision on 28 February 2021 to dismiss the appellant’s application for the writ of *habeas corpus*.

Decision Of The Learned High Court Judge

[2] On the issue of whether the re-arrest of the appellant on 15 September 2020 when his pass was still valid, His Lordship held that since his pass was revoked during the detention ordered by the learned Sessions Court Judge, this case is distinguishable from *Sajad Hussain Wani v. Ketua Pengarah Imigresen Malaysia & Satu Lagi* [2008] 2 CLJ 403, because Sajad was never brought before any Magistrate for further detention, his offence was in respect of immoral acts against the teaching of Islam and not one under the Act like the appellant here. Secondly, the detention of the appellant from the date of his arrest until that ordered by the Sessions Court Judge on 1 October 2020 was lawful as art. 5(4) of the Federal Constitution allows 14 days after the arrest of a non-citizen for his production before a Magistrate. His Lordship also found no merit on the allegation that the appellant was not served with the notice of detention and deportation as the appellant, who is well versed in Bahasa Melayu as he affirmed his affidavit in support of the writ in Bahasa Melayu without aid of translator, had acknowledged receipt of the documents on 14 October 2020. The appellant, held His Lordship further, had also failed to show how he was prevented from lodging the appeal with the third respondent under reg. 26(1) and based on *Pua Kim Wee v. Ketua Pengarah Imigresen Malaysia & Anor* [2016] 1 LNS 1358; [2017] MLJU 902, there is no express or implied duty on the said Minister to give reasons for the cancellation of the pass.

The Appeal

[3] Before us, learned counsel for the appellant reiterated the stands taken by him in the High Court, which are:

- A (i) The appellant's further detention on 15 September 2020 under s. 35 of the Act was void, invalid and made *mala fide*;
- (ii) The notice of revocation of the pass dated 14 October 2020 was improper and also made *mala fide*;
- B (iii) The detention under s. 34 was invalid and made *mala fide*;
- (iv) The deportation order was against the law and made *mala fide*.

[4] Before delving into the merits of the above contentions, it must be noted that just about a week before the hearing of the appeal before us, that is 15 September 2021, the appellant had been released from his detention. That decision was made, according to learned counsel for the appellant, after parties were directed by us to submit on the issue the constitutionality of the ouster clause in s. 59A of the Act. Given that fact, the learned Senior Federal Counsel submitted, at the commencement of the hearing of the appeal, that it be vacated since it is academic but which we did not accede to for the reason that this court in *Zaidi Kanapiah v. ASP Khairul Fairoz Rodzuan & Ors And Other Appeals* [2021] 5 CLJ 581, have decided, at para. 203 of the judgment of the Chief Justice Tun Tengku Maimun binti Tuan Mat that the matter is not academic even after the release of the detainee. I will now proceed to consider the merits of the appeal in the following manner.

E Detention Under S. 35 Of The Act

Section 35 provides as follows:

Section 35 – Power to arrest person liable to removal

F *Any person reasonably believed to be a person liable to removal from Malaysia under this Act may be arrested without warrant by any immigration officer generally or specially authorised by the Director General in the behalf or by a senior police officer, and may be detained in any prison, police station or immigration depot for a period not exceeding thirty days pending a decision as to whether an order for his removal should be made.* (emphasis added)

G [5] Learned counsel for the appellant submitted that the said detention of the appellant was illegal because he was not a prohibited immigrant under s. 8(3) or an illegal immigrant under s. 56(2) of Act since he had a valid pass until 21 March 2021 and therefore, could only be detained after that pass was cancelled. Furthermore, submitted learned counsel, the appellant was also not produced before the Magistrate after his further detention on 15 September 2020 and which made the detention illegal as held in *Sajad Hussain's case (supra)* because a detainee must be produced before a Magistrate within 14 days as provided in the second proviso to art. 5(4) of the Federal Constitution. That s. 35, said learned counsel could not override the said proviso because the said article's application is only exempted against enemies of the State, of which the appellant was not.

[6] With respect to learned counsel, I am unable to accede to that submission for as rightly submitted by the learned Senior Federal Counsel (“SFC”) since the appellant had committed an offence under reg. 39(b), he comes under the phrase “a person reasonably believed to be a person liable to removal from Malaysia” as highlighted in reproduction of s. 35 above and therefore, as authorised by the said provision, his further detention of 30 days is permitted pending a decision on his removal from the country. The said s. 35 is not contrary to art. 5 because, firstly, the clear proviso in art. 5(4) on the requirement to produce the arrestee before a Magistrate within 14 days of his arrest applies to the initial arrest and detention and this requirement is clearly incorporated in s. 51(5)(b). The above-mentioned provisions read as follows:

Article 5(4)

- (4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate’s authority:

Provided that this Clause shall not apply to the arrest or detention of any person under the existing law relating to restricted residence, and all the provisions of this Clause shall be have been an integral part of this Article as from Merdeka Day:

Provided further that in its application to a person, other than a citizen, who is arrested or detained under the law relating to immigration, this Clause shall be read as if there were substituted for the words “without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey)” the words “within fourteen days”.

And provided further that in the case of an arrest for an offence which is triable by a Syariah court, references in this Clause to a magistrate shall be construed as including references to a judge of a Syariah court.

Section 51, Powers of search and arrest.

- (1) ...
(2) ...
(3) ...
(4) ...
(5) Notwithstanding anything contained in this Act or in any subsidiary legislation made under this Act:
(a) where any person who is a citizen is arrested or detained under this Act otherwise than for an offence against this Act, and has not been earlier released, he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time

A for any necessary journey), be produced before a Magistrate and shall not be further detained in custody without the Magistrate's authority; and

B (b) where any person other than a citizen is arrested or detained under this Act, whether for an offence against this Act or otherwise than for such offence, and has not been earlier released, or charged in court for an offence against this Act, or removed from Malaysia under this Act, he shall, within fourteen days of his arrest or detention, be produced before a Magistrate who shall make an order for his detention for such period as may be required by an immigration officer or a police officer for the purpose of investigations into an offence against this Act, or by an immigration officer for the purpose of either making inquiries, or effecting his removal from Malaysia, under this Act,

C and any provision of this Act or any subsidiary legislation made under this Act providing for the arrest or detention, otherwise than for an offence, of a person who is a citizen, or for the arrest or detention of a person other than a citizen, whether for an offence against this Act or otherwise than for such offence, shall be read as being subject to the provisions of paragraph (a) or (b), as may be applicable:

D

E Provided that the Magistrate before whom such person is produced under paragraph (a) or (b), as the case may be, shall not authorize or order the detention of such person for a period in excess of the maximum period which may be specified in the provision under which he is to be detained. (emphasis added)

[7] Secondly, his further detention under s. 35 was merely pending a decision whether to remove him. It is obvious from Part V of the Act in which the said section is legislated that a "person liable to removal from Malaysia" is one who has committed a transgression under the Act which warrants the exercise of the Immigration authority's power under s. 51(5). Once that said decision to remove is made, then s. 34 comes into play. It is therefore a continuous process and given the incorporation of the proviso into s. 51(4) as stated earlier there is no legal necessity to repeat the same requirement in s. 35. Learned counsel for the appellant has also referred us to the decision of Zaharah Ibrahim J (as Her Ladyship then was) in *Sajad Hussain Wani's* case (*supra*) which held that the detention of the applicant in that case whilst still having a valid pass was illegal. I would agree with the learned SFC that the facts in the said case are clearly distinguishable because it was an undisputed fact that the appellant (who at the time of his arrest for immoral conduct against the precepts of Islam also had a valid pass) was never brought before a Magistrate from the date of his arrest until the hearing of the writ for *habeas corpus*. Her Ladyship held that he should have been brought before a Magistrate within 14 days from the date of his arrest as required by the second proviso to art. 5(4) which is reflected in s. 51(5) of the Act and as his detention was under s. 35, the Magistrate could not order it for more than 30 days as stipulated under the Act.

F

G

H

I

[8] Her Ladyship further held that the detention under s. 35 is only lawful after the pass had been cancelled because it clearly stipulates that power to arrest and detain is to be exercised on “a person liable to removal from Malaysia.” Only after that pass is cancelled the provision in s. 9(4) of the Act would apply. The said s. 9(4) reads:

- (4) Where a Pass is cancelled under paragraph (1)(b) or a Permit is cancelled under paragraph (1)(c):
- (a) if its holder is present in Malaysia, he shall not remain in Malaysia after such cancellation and shall be removed from Malaysia in accordance with the provisions of this act, and he shall, thereafter, be prohibited from entering Malaysia; and
 - (b) if its holder is outside Malaysia, he shall be prohibited from entering or re-entering Malaysia.

[9] In this case before us, the undisputed evidence is that the appellant was brought before the learned Magistrate right after his initial arrest and was brought before the learned SCJ on 1 October 2020 before the expiry of his 30 days detention under s. 35, which was before the cancellation of his pass on 14 October 2020 as per the notice dated the same date (see exh. RISM1 to the affidavit of Ruzaana binti Mohamad affirmed on 29 December 2020 at p. 165 of AR vol. 3). His re-arrest and detention under s. 34 were done on the same day (see “exh. LBJ7” to the affidavit of Lelawati binti Jamaludin affirmed on 29 December 2020 at pp. 121 until 122 of AR vol. 3). As noted by the learned HCJ in his judgment, from 1 October 2020 until 30 December 2020, the appellant was brought before the learned SCJ seven times to extend his remand. Therefore, there was no contravention of the law of the like which had happened in *Sajad’s* case (*supra*).

Cancellation Of The Pass Under Reg. 19(3)

Learned counsel for the appellant submitted that the said cancellation was invalid because the notice of cancellation should have been sent *via* post to his last known address and if that failed, then to *Gazette* it within seven days as provided by reg. 19(3) and s. 9 of the Act. That notice also should have been signed by the Director General or Deputy Director General of Immigration as required by s. 9(7) but here it was signed by the State Deputy Director of Immigration, one Ruzaana binti Mohamed. The relevant provision of reg. 19 is reproduced below:

Regulation 19 - Cancellation of Pass and Forfeiture of Security

- (1) Without prejudice to any other specific power to cancel a Pass conferred by or under these Regulations, if the Controller is satisfied that the holder of any Pass issued under these Regulations **has contravened** or failed to comply with any provision of the Ordinance or of any of the Regulations, or with any condition imposed in respect of or instruction endorsed on such Pass he may:

- A (a) forthwith cancel such Pass; and
(b) in any case where security has been deposited under regulation 18 of these Regulations, and whether or not the Pass is cancelled, direct the forfeiture of such security or any part thereof.

- B (3) Notice of the cancellation of any Pass or of the forfeiture of any security or any part thereof **shall be given to the holder of such Pass**: Provided that it shall be sufficient if such notice is forwarded by registered post to the last known address of the holder.
(emphasis added)

- C The relevant provision of s. 9 is reproduced below:

Section 9 – Director General’s power to prohibit entry, or cancel any Pass or Permit.

- D (1) Notwithstanding anything contained in this act or in any subsidiary legislation made under this act, the Director General may:

- (a) where he deems it expedient to do so in the interests of public security or by reason of any economic, industrial, social, educational or other conditions in Malaysia, by order, prohibited, either for a stated period or permanently, the entry or re-entry into Malaysia of any person or class of persons:

- E Provided that the order made under this paragraph shall not apply to any citizen or to the holder of any valid Pass or Permit;

- (b) in his absolute discretion cancel any Pass at any time by writing under his hand; or

- F (c) cancel any Permit at any time by writing under his hand, if he is satisfied that the presence in, or entry into, Malaysia of the holder of any Permit is, or would be, prejudicial to public order, public security, public health or morality in Malaysia or any part thereof.

- G (3) Every cancellation of a Pass under paragraph (1)(b) or a Permit under paragraph (1)(c) shall come into force on the date of the cancellation, and the Director General shall, as soon as may be thereafter, **cause a notice of the cancellation to be sent to the holder of the Pass or Permit, as the case may be**, if his address is known, and if it is not known, shall cause the notice to be published in such manner as he deems fit.
(emphasis added)

- H [10] The raising of the above arguments is, again with respect, without any merit because firstly, s. 3(3)(a) and (b) of the Act allows the exercise of the Director General’s power to be done by a Deputy Director General of Immigration or any other Senior Immigration Officer. The said provision
I reads:

Section 3. Appointment and powers of Director General and others

(3) The powers and discretions vested in the Director General by this Act, and the duties required to be discharged by him may, subject to section 4 and to such limitations as may be prescribed, be exercised and discharged by:

(a) a Deputy Director General of Immigration or Director of Immigration; (a) a Deputy Director General of Immigration or Director of Immigration;

(b) any senior immigration officer authorized in writing in that behalf by the Director General

Secondly, with regards to the service of the said notice, it is equally a nonissue because the said notice was served personally on the appellant. Although reg. 19(3) uses the word “sent to the holder of the pass” as I had emphasised above. Nonetheless, it is crystal clear from the words in the said provision that the intention of the legislative is to notify the pass holder of the said cancellation and there can be no better way to do that than to give the notice to him in person.

[11] Learned counsel for the appellant further submitted that the cancellation was made *mala fide* and against the interim stay granted by the learned High Court Judge. However, that interim stay was against the deportation of the appellant and given the contravention of the pass by him, as evidenced by the payment of the compound fee, that official move of the Department was in my view, more than justified.

Detention Under S. 34 Of The Act

[12] Learned counsel for the appellant submitted that the appellant’s detention under s. 34 of the Act pending his deportation was void and also made *mala fide* because only migrants who had been found guilty or have reasonable grounds for committing offences under ss. 5, 6, 8, 9, 15, and 60 of the Act are liable to be deported back to their country of origin but not one like the appellant who had been fined or compounded for offences under the regulation. It was learned counsel’s stand that s. 32 until 34 of the Act are only applicable to offenders convicted under s. 5, 6, 8, 9, and 60 of the Act and he pointed out that s. 9(1)(a) is clearly inapplicable to a Malaysian citizen and a valid pass holder. Learned SFC however highlighted to us in both his oral and written submissions the fact of the appellant being granted, on 11 April 2021 an interim stay of the deportation order pending the disposal of his appeal to this court. Therefore, said the learned SFC, there was no issue about the legality of his detention under the said s. 34. Granted that this is so, but nevertheless for the sake of argument, I would still address the point raised by learned counsel for the appellant as follows.

A [13] Now, with respect to learned counsel, I am not persuaded that section 34 is to be read in the said manner as submitted by him. It is clear from the heading and the reading of Part V of the Act which is titled “Removal from Malaysia” that each provision in the said Part V, that is s. 31 until 36 caters for different situations pertaining to the removal. Section 31 is on removal of prohibited immigrants from Malaysia, s. 32 is on removal of illegal immigrants, s. 34 is on detention of persons ordered to be removed, s. 35 is on power to arrest person liable to removal and s. 36 on unlawful return of a person to Malaysia who had been so removed. Since we are concerned with s. 34, I would reproduce the said section below:

C **Section 34 – Detention of persons ordered to be removed**

- (1) Where any person is ordered to be removed from Malaysia under this act, such person may be detained in custody for such period as may be necessary for the purpose of making arrangements for his removal:

D Provided that any person detained under this subsection who appeals under subsection 33 (2) against the order of removal may, in the discretion of the Director General, be released, pending the determination of his appeal, on such conditions as to furnishing security or otherwise as the Director General may deem fit.

E (2) Subject to the determination of any appeal under section 33, any person who is ordered to be removed from Malaysia may be placed on board a suitable vessel or aircraft by any police officer or immigration officer, and may be lawfully detained on board the vessel or aircraft, so long as the vessel or aircraft is within the limits of Malaysia.

F (3) Any person who is detained in custody in pursuance of an order made by the Director General Under subsection (1) may be so detained in any prison, police station or immigration depot, or in any other place appointed for the purpose by the Director General.

G [14] Very obvious from the clear reading of s. 34(1) above that the Director General is given the power to detain any person ordered to be removed whilst arrangements are being made for his removal. That is obviously the case with the appellant here for the order for his removal had been made. There is no such limitation as submitted by learned counsel for that section to only be utilised against offenders convicted of the said s. 5, 6, 8, 9 and 60 as stated above. It is to be noted that the appellant in this case was given, and he did utilise his right to appeal against his removal, but that appeal was rejected by the committee (see “exh. LBJ6” to the affidavit of Lelawati binti Jamaludin affirmed on 29 December 2020 at p. 116 until 119 of AR vol. 3).

I

[15] Learned counsel for the appellant referred us to the case of one Muhammad Abu Shaleh who was granted a writ of *habeas corpus* by the High Court on the ground that the commission of an offence under reg. 39(b) was not a serious offence which warrants his removal. The sealed order in the said case is reproduced below:

Dalam perkara pengistiharan oleh Ketua Pengarah Imigresen bahawa MOHAMMAD ABU SHALEH – No. Pasport: BH0595881 adalah imigran larangan menurut seksyen 6(1)(c) Akta Imigresen 1959/1963 dan oleh yang demikian, kehadiran mereka adalah bertentangan dengan undang-undang

DAN

Dalam perkara perintah pengusiran berkenaan pengusiran MOHAMMAD ABU SHALEH – No. Pasport: BH0595881

DI HADAPAN HAKIM
AZMAN BIN ABDULLAH
PADA 30 OGOS 2018

DALAM MAHKAMAH TERBUKA

PERINTAH

PERMOHONAN INI yang ditetapkan untuk Pendengaran pada hari ini dengan kehadiran Harpal Singh, Peguam bagi pihak Pemohon dan Nurul Hanawi, Peguam Persekutuan bagi pihak Responden DAN SETELAH MEMBACA Notis Usul dan Affidavit yang difailkan DAN SETELAH MENDENGAR hujahan kedua-dua pihak yang tersebut di atas MAKA ADALAH DIPERINTAHKAN bahawa Permohonan untuk writ *habeas corpus* ini adalah DIBENARKAN dan ADALAH JUGA DIPERINTAHKAN bahawa Permohonan tidak boleh ditangkap semula *sehingga program rehiring dan penempatan semula PATI dengan bayaran telah dibuat [dan tidak pernah dikembalikan jika menolak permohonan mereka]* diberikan kepada Pemohon seperti yang dijanjikan menurut tempoh yang ditetapkan dan hak-hak mereka.

DIBERI di bawah tandatangan saya dan meterai Mahkamah pada 30 Ogos 2018.

Bertarikh pada 30-Ogos-2018

t.t

NUR AIN BINTI MUSTAPA
Penolong Kanan Pendaftar
Mahkamah Tinggi Malaya
Kuala Lumpur.

(emphasis added)

[16] The same entities who are the respondents in this case, except that the Commandant of the Immigration Depot in the cited case is that of Semenyih, appealed to this court in *Ketua Pengarah Imigresen & 3 Ors v. Mohammad Abu Shaleh* (Federal Court Criminal Appeal No: 05(HC)-234-10-2018(W)). Learned counsel submitted that the parties agreed to delete the further order as highlighted above and therefore, the rest of the decision of the learned High Court was affirmed. However, when I examined the sealed court order

- A of this court, reproduced as part of Tab G of the appellant's bundle of authority, it very clearly states that the appeal of the appellants (ie, the respondent's in this case before us) was allowed, meaning to say that the decision of the learned HCJ to issue the writ of *habeas corpus* was reversed, although the further order of the learned HCJ was set aside. I would for the
B sake of clarity reproduce the order below:

DALAM MAHKAMAH TERBUKA
PADA 27 HARIBULAN FEBRUARI 2019
MPRJ NO: 05(HC)-234-10/2018 (W)

PERINTAH

- C RAYUAN INI yang ditetapkan untuk pendengaran pada 27 haribulan Februari 2019 dalam kehadiran Peguam Kanan Persekutuan Fazril Sani bin Mohamed Fadzil bagi pihak Perayu-Perayu dan Harpal Singh (Tan Cheng Yee bersama-samanya) Peguambela bagi pihak Responden DAN
D SETELAH MEMBACA Notis Rayuan dan Rekod-Rekod Rayuan yang kesemuanya difailkan di sini DAN SETELAH MENDENGAR hujahan pihakpihak yang tersebut di atas MAKA ADALAH DIPERINTAHKAN bahawa rayuan Perayu-Perayu dibenarkan. Perintah Mahkamah Tinggi bertarikh 30.08.2018 dipinda dengan mengeneipkan Perintah "bahawa Pemohon tidak boleh ditangkap sehingga program rehiring dan penempatan semula PATI dengan bayaran telah dibuat [dan tidak pernah
E dikembalikan jika menolak permohonan mereka] diberikan kepada Pemohon seperti yang dijanjikan menurut tempoh yang ditetapkan dan hak-hak mereka.
DIBERI di bawah tandatangan saya dan Meterai Mahkamah pada 27hb. Februari 2019.

- F t.t

...

Aishah Ameerah Binti Che Johan
Penolong Kanan Pendaftar
Mahkamah Persekutuan
Putrajaya

- G

Thus, with respect, there is again no merit in learned counsel's argument that the commission of an offence under reg. 39(b) would not be a legal basis to order the removal of an immigrant like the appellant.

- H **Ouster Clause**

- I [17] I must state at the outset that the issue of whether s. 15B(1) of the Act which is on the court's power to review the act or decision of the Board is constitutional was not raised by the parties either here or in the court below but they were requested by us to submit on it and which they did, comprehensively. However, it has occurred to me post that directive that this very issue on the constitutionality of s. 15B was the subject of a pending appeal in this court when it allowed an application to review the decision of a five member panel in *Nivesh Nair Mohan v. Dato' Abdul Razak Musa*,

Pengerusi Lembaga Pencegahan Jenayah & Ors [2021] 8 CLJ 163. I was in that panel chaired by the Chief Justice Tun Tengku Maimun binti Tuan Mat, which allowed the said review and given the size of the earlier coram, it would not be wrong for me to surmise that a similar number of coram, if not more, would rehear the appeal which is currently fixed for hearing on 25 April 2022. In the circumstances and with the deepest of regret and profound apologies to both parties for what would be their wasted effort given the decision I am about to make, which is, that I am of the considered view that this issue would be better and more expeditiously dealt with at the rehearing of *Nivesh's* case (*supra*).

Deportation Order Illegal And Made *Mala Fide*

[18] The deportation order is stated to be made under s. 56(2) of the Act but the appellant did not commit such an offence under s. 56(1). Learned counsel for the appellant submitted that the said order was therefore illegal and was made *mala fide* because he was not a person “liable to be removed” under s. 56(2) and that he had a valid pass until 12 March 2021 when he was detained on 5 September 2020. He was thus not a prohibited immigrant as defined in s. 8 of the Act. The learned SFC conceded orally at the hearing before us that the citation of that subsection was wrong but that the matter was in a way resolved because the appellant was given a special pass and handed over to his employer after the interim stay of the order was granted. In other words, he was not deported. In my view, the wrong citation of the relevant provision in itself cannot be evidence of *mala fide* and the issuance of the special pass is further evidence of the respondent’s good faith in respect of his detention. Nevertheless, that error has rendered the deportation order illegal and it must accordingly be set aside for the simple reason that the law is trite and entrenched that a detainee like the appellant is entitled to take full advantage of any technical imperfection which has the effect of invalidating the order that incarcerates him without trial or even with trial. In relation to *habeas corpus* application, the above-mentioned law in a detainee’s favour was expressed in the often-quoted decisions of *Re Datuk James Wong Kim Min; Minister Of Home Affairs, Malaysia & Ors v. Datuk James Wong Kim Min* [1976] 1 LNS 129; [1976] 2 MLJ 245 and *Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri & Satu lagi* [1994] 4 CLJ 47. No court of law should condone such an error in this case which actually is easily rectified by an application to amend the same. Consequentially, on this ground alone the appeal of the appellant is allowed as the appellant was entitled to be granted the writ of *habeas corpus* as prayed by him and thus the respondent’s pre-emptive decision to release him must therefore be maintained.

[19] My learned sister and brother judges, Nallini Pathmanathan, FCJ, and Harmindar Singh Dhaliwal, FCJ, have read this judgment in draft and have expressed their agreement with it.